

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

SUNRISE SENIOR LIVING, INC. ^{1/}

Employer

and

Case 9-RC-18066

ASSOCIATION OF HEALTHCARE MANAGERS,
LOCAL 2600 ^{2/}

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is engaged in the business of managing, leasing, owning and operating about 420 to 425 assisted living communities throughout the United States, Canada, England, and Germany, including the only facility involved in this proceeding, Sunrise of Bexley which is located in suburban Columbus, Ohio. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's lead care managers (LCM), care managers (CM), kitchen workers, and housekeeping employees employed at its Bexley facility, excluding all professional employees, guards and supervisors as defined in the Act. There is no history of collective bargaining affecting any of the employees involved in this proceeding. A hearing officer conducted a hearing in this matter on the issues raised by the petition.

There are three principle issues over which the parties disagree. First, whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Second, if Petitioner is a statutory labor organization then I must determine whether five lead care managers (LCMs) should be excluded from the unit because, as the Employer asserts, they are supervisors within the meaning of Section 2(11) of the Act. Lastly, I must also determine whether certain employees share a community of interests with the employees in the proposed bargaining unit warranting their inclusion in the unit, as the Employer contends, or whether their community of interests vis-a-vis the proposed unit is sufficiently distinct that I am not compelled to include them over the wishes of the Petitioner. In this regard, the Employer would include the two concierges, the administrative assistant, the activities and volunteer coordinator, the director of

^{1/} The name of the Employer appears as amended at the hearing.

^{2/} The name of the Petitioner appears as amended at the hearing.

community relations and five wellness nurses in the proposed unit. The parties agreed on the inclusion and exclusion of the following employees:

All full-time and regular part-time care managers, including the student care managers, housekeepers, and cooks, excluding the resident care coordinator, dining services coordinator, maintenance coordinator, healthcare coordinator, associate executive director, and all professional employees, guards, and supervisors, as defined in the Act.

The Petitioner has stated a willingness to proceed to an election in any unit found appropriate.

As more fully explained below, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I have proceeded to make additional findings as to the appropriate unit. In this regard, and after careful consideration of all of the evidence presented, I have concluded that the Employer has not met its burden of establishing that LCMs are supervisors within the meaning of Section 2(11) of the Act. Additionally, I have concluded that the concierges and the activities and volunteer coordinator share a substantial community of interests with the petitioned-for employees which warrants their inclusion in the unit and I will include them. With regard to the five wellness nurses, the administrative assistant, and the director of community relations, the record shows and I find that they do not share a sufficient community of interests with the other unit employees to compel their inclusion in the unit. As a result of my findings, there are approximately 32 employees in the appropriate unit.

In reaching my determination on these issues, I have carefully considered the record evidence, the arguments made by the parties at the hearing in this matter, and also those contained in the Employer's post hearing brief.^{3/} In explaining how I came to my determination on these issues, I will first describe the Employer's operations and then the dispositive facts governing the nature of the employment relationship. The facts will be followed by my analysis of the issues in relation to the applicable legal precedent.

II. OVERVIEW OF OPERATIONS

As noted, the Employer manages, leases, owns, and operates over 400 assisted living communities on a national and international basis, including the Bexley, Ohio operation involved here and referred to as the Bexley facility. The Bexley facility housed about 45 residents at the time of the hearing with a total of 53 resident suites with a capacity for 57 residents. The Bexley residents are generally independent but require varying degrees of assistance with their activities of daily living, including eating, toileting, bathing, and dressing.

The Bexley facility is referred to as a Victorian-style mini-mansion with turrets. The exterior includes a wraparound porch, back patio, and garden. The interior of the Bexley facility has three resident floors and a basement. The first two resident floors are referred to by the Employer as its assisted living neighborhood. The third floor is referred to as the "reminiscence

^{3/} The Petitioner did not file a post-hearing brief.

neighborhood” and contains suites for residents who are suffering from Alzheimer’s and dementia. This floor is a secured floor and residents who reside on this floor cannot leave the floor unattended. If they attempt to leave they set off an alarm. The first floor also includes the main dining room, a bistro café, an ice cream parlor, a common area designated as a parlor, and another common area with a piano called the Grand Foyer. In addition to the resident area, the second floor includes two lounges, a hair salon for residents and a “wellness center” where the nurses work and perform their paperwork. The third floor includes two more common areas, the resident kitchen and a tea room. Approximately 30 residents live on the first two floors and the remainder live on the reminiscence (third) floor. The basement of the facility consists of the main kitchen where the daily meals are prepared, a laundry, records storage, pantry or food storage area, a mechanical room, and a maintenance area.

All employees share similar terms and conditions of employment. Thus, they share a common smoking area and a break area in the basement of the facility. Additionally, all of the hourly employees punch a timeclock that is also located in the basement of the facility. In this connection, all employees are hourly paid with the exception of the associate executive director, the resident care coordinator, the healthcare coordinator and the director of community relations.

There are 5 LCMs and 18 CMs employed by the Employer at the Bexley facility. Additionally, there are three housekeepers and three cooks. There are five wellness nurses, two of whom are RNs and three of whom are LPNs. Finally, there are two concierges, activities and volunteer coordinator and an administrative assistant. The highest ranking manager at the Bexley facility is Associate Executive Director Shannon Kneisley. Kneisley reports to Area Manager of Operations Charles Latta, who has operational responsibility for 14 of the Employer’s facilities, including Bexley. Stipulated supervisors under Kneisley include Resident Care Coordinator Tammie Dillon, and Dining Services Coordinator Isaac Nehring. The healthcare coordinator and maintenance coordinator positions are also stipulated by the parties to be supervisory positions but those positions are currently vacant.

III. LABOR ORGANIZATION FACTS

The Employer declined to stipulate to the labor organization status of the Petitioner. The record reflects that a group of the Employer’s Bexley employees held meetings for the purpose of organizing the employees. The employees formed the Petitioner and gave it a name sometime prior to the filing of the petition in 2006. The employees selected John Butler to act as their temporary business manager. Butler then filed the subject petition on behalf of the employee group. Butler testified that the Petitioner intends to negotiate a contract with the Employer if it is selected as the employees’ collective-bargaining representative. He also testified that the Petitioner exists at least in part for the purpose of dealing with the Employer concerning conditions of work and other subjects such as grievances and labor disputes. The Petitioner is not affiliated with any other labor organization.

IV. LEAD CARE MANAGERS AND CARE MANAGERS

The parties stipulated, and the record shows that LCMs do not have the authority to suspend, layoff, recall or permanently transfer employees. In addition, there is no evidence that

LCMs hire, promote, discharge, adjust employees' grievances or that they effectively recommend such actions. In connection with hiring, Resident Care Coordinator Tammie Dillon testified that LCMs are expected to be involved in the hiring process by participating in group interviews. However, this is a prospective change in procedure only and it has not yet occurred. The one recommendation for hire that came out of this recently changed procedure was made by a CM, not an LCM. Moreover, to guess at the degree of participation LCMs may have in this process and the extent to which any recommendations they make will be relied upon in making hiring determinations is clearly speculative. Accordingly, the Employer's principal contention is that the LCMs are supervisors within the meaning of the Act based on their purported authority to discipline, reward employees through their participation in the evaluation process, and to assign and responsibly direct employees.

RCC Dillon, who was promoted to the position from a CM position 3 months prior to the hearing, is in charge of the LCMs and CMs in the assisted living and reminiscence neighborhoods. Dillon works 5 days a week, Sunday through Thursday from about 8:30 a.m. or 9 a.m. to 6 p.m.^{4/} The five LCMs in dispute are: Bettina Eader, Karen Jones, Cynthia Abbott, Geraldine Keel, and Marie Fequiere. LCMs and CMs are present in the Bexley facility every day of the week, 24-hours a day, on three primary shifts. The three shifts are the first shift from 6 a.m. to 2:15 p.m., the second shift from 2:15 p.m. to 10 p.m., and the third shift from 10 p.m. to 6 a.m. However, reporting times for the LCMs and CMs may vary as is the case with the primary first shift when the LCM begins her shift at 6 a.m., a CM begins at 6:15 a.m., and the second CM begins her shift at 7 a.m.

The parties agree, and the record reflects, that CMs on the third floor of the facility perform the same duties as do CMs on the first and second floor of the facility, although the third floor is as previously noted, a secured floor. As indicated above, the first shift in assisted living is typically staffed with an LCM and two CMs. The first shift in "reminiscence" is typically staffed with one lead care manager and one care manager, but LCM Karen Jones, for health reasons, has not worked in "reminiscence" since December 2005. As a result, the Employer has been utilizing Jones in the dining room on the first shift and has employed two CMs in "reminiscence" on that shift. Although Jones has continued to be employed as a LCM, she has not been responsible for the "reminiscence" floor during this timeframe. The second shift in assisted living and in "reminiscence" is staffed similarly to the first shift with one LCM and two CMs in assisted living and one LCM and one CM in "reminiscence." The third shift is staffed with a single LCM and a single CM for the entire facility.

Compensation

If there is an LCM on a particular shift she is typically the first to report on that shift. In this regard, LCMs at Bexley currently earn from \$10.11 to \$15.65 an hour and CMs currently earn from \$8.50 to \$13.36 an hour. However, the difference in hourly wages between LCMs and CMs is attributable, in part, to some of the LCMs possessing greater seniority than the CMs. The only true difference in compensation between LCMs and CMs is that LCMs typically, though not always, receive \$1 an hour over the rate that they were earning as a CM on their appointment

^{4/} Dillon works this schedule because it is the Employer's policy to have some type of management presence in the facility on the weekends.

to an LCM position. Except for the minor difference in their compensation, all other benefits and working conditions of the LCMs and CMs are the same.

Job Duties

The LCMs and CMs perform nearly identical duties on a day-to-day basis. However, the LCMs may spend an additional 10 to 20 minutes a shift completing paperwork that the CMs do not always have to do. Thus, LCMs and CMs are assigned a grouping of residents in either "assisted living" or "reminiscence" for whom they are responsible on a permanent basis. Each resident has an individual service plan (ISP) which LCMs and CMs consult when questions arise about the level of care needed or desired by any of their assigned residents. The LCMs and CMs spend the vast majority of their working hours attending to the activities of daily living (ADL) of the residents for whom they are charged with caring. In this regard, LCMs and CMs make rounds about every two hours to ensure that their residents' ADLs are being addressed. An LCM may on occasion temporarily cover a staffing shortage on one floor by moving a CM to the uncovered floor. However, no independent judgment is involved in making this adjustment as at least one CM or LCM must be on the third floor at all times to provide for the care of residents suffering from Alzheimer's or dementia.

Assignment of Work

The "paperwork" that is typically completed by the LCMs consists of an assignment sheet for each shift and a 24-hour report. The record discloses that while LCMs are primarily responsible for completing the assignment sheets, these sheets are sometimes completed by CMs. Moreover, they are not always completed in advance of the shift, but are sometimes completed at the end of the shift to reflect those tasks that were actually performed by the LCMs and CMs during the course of the particular shift. A daily log is also kept at the facility. Unlike the 24-hour report, entries in the daily log may be recorded by any of the employees employed at the Bexley facility and consists of notes of interest about a resident or a particular subject. In contrast, notations in the 24-hour report are made by LCMs, and occasionally by CMs, and detail residents' events and issues that occurred that day and which may be of interest to oncoming department heads, LCMs, CMs and wellness nurses for the purpose of ensuring that the residents are properly cared for and that their ADLs are addressed. The record also discloses that the 24-hour report is for "nursing" and that this is a nursing report sheet on which information is generally recorded by nursing personnel. Thus, the precise contributions for LCMs and CMs to this log are not entirely clear on the record. The 24-hour report is read at daily "stand up" meetings which are brief status meetings conducted with department level personnel. LCMs do not attend the "stand up" meetings.

LCMs do not regularly assign tasks to CMs during the course of the work day, nor do they direct the work of the CMs. They may provide a daily assignment sheet to CMs on their shift. However, there was testimony that the assignment sheets are not always provided to experienced CMs, who are designated to care for certain residents based upon their familiarity with these residents. Moreover, in at least some instances, the assignment sheets have been regularly completed by CMs. The assignment sheets consist of forms with a large amount of pre-printed information that has been entered into the Employer's computer system by the RCC

who obtains the information from residents' ISPs. This pre-printed information includes the names of each resident, room number, whether the resident has a do not resuscitate order, the type of service requested, type of diet, any continence supplies and any toileting frequency specifications. The assignment sheets remain the same from day-to-day unless there has been a change in the resident population or a change in the diet or other needs of one or more of the residents.

A small amount of information is entered into these assignment sheets. Although not exclusively, this is often done by the LCM on a particular shift. As previously noted, experienced CMs may complete their own assignment sheets, including inputting any relevant information in the comments section of each assignment sheet. This information is sometimes inputted by the CM or LCM for her respective resident populations at the close of the shift to reflect the work that was performed as opposed to notating the work to be performed. This information includes laundry, activity assignments, and shower or bath requirements for residents. All of this information is obtained from a calendar or schedules that are maintained in the first floor office of the facility in the ISP book. Thus, a laundry schedule specifies when each resident's laundry must be done but some deviation from the schedule is required as residents may need their laundry done more often than is indicated by the schedule. A shower or bath schedule specifies the bathing requirements and frequency for each resident, and activities are noted on a posted calendar that is created by the activities and volunteer coordinator. When an LCM distributes laundry between two CMs she merely ensures that the loads are equalized. Currently the LCM covering the dining room does not receive an assignment sheet.

The record discloses that the LCMs and CMs on particular shifts typically take their meal breaks at the same time day after day. The times when they take meals are controlled by the LCMs and CMs by their need to be available to the residents during residents' meals and if any other resident need arises. The times that the LCMs and CMs take meals also typically dictates which activity they will handle on their shift. CMs may trade assigned activities between themselves without consultation or approval from LCMs.

Training

LCMs and CMs receive training from the Employer known as Star Level training. The CMs receive three levels of such training, with each training session for the first three levels lasting about a shift, or a significant portion of a shift. The LCMs receive an additional training session called Star Level 5 training. It appears that Star Level 5 training may take as much as 2 days.^{5/} LCMs go over training practicums with CMs to ensure that the CMs understand the training that the Employer has provided. CMs do not conduct training practicums. New hires also receive 3 days of training where they are taught the specific needs, requirements, and desires of the residents to which they will be assigned. This training is conducted by LCMs or CMs, depending on availability and knowledge of the residents and shift to whom the new CM will be assigned.

^{5/} Star Level 4 training involves instruction on passing medication, a function that the State of Ohio limits to properly certified nursing personnel. Accordingly, the Employer's Ohio CMs and LCMs do not take that level.

Evaluations

The record discloses that the "Performance Appraisal and Evaluation" that is used for 90-day probationary reviews and for annual reviews of LCMs and CMs are sometimes partially completed by LCMs. However, the record shows that these evaluations are reviewed by admitted supervisory personnel, including the RCC. Evaluations that LCMs participated in are signed by the LCM, RCC, and the Executive Director. Although the various performance categories on the evaluations can be circled and rated by an LCM, the RCC may change the LCM notation if the RCC disagrees with it. Additionally, record testimony discloses that the authority of LCMs to rate the performance level for a CM being evaluated is further circumscribed because LCMs are encouraged by admitted supervisors or managers to rate employees a "3" or "4" in nearly all performance categories. This instruction effectively results in a 3% raise for nearly all CMs so evaluated based on the Employer's purported method for calculating wage increases. Further, most of the LCMs are unaware that the circled numbers on the evaluation forms are tied to the wage increase percentage a CM receives. In this connection, one LCM testified that she had only been advised of this fact when she participated in an evaluation 2 days before the commencement of the hearing in this matter. Finally, the record shows that some of the evaluations that LCMs were asked to complete were already partially filled out by the RCC with some or all of the rating categories having already been circled.

It appears from the record that the Employer's performance evaluation policy is not in writing. There is no evidence that these evaluations are used by the Employer to determine whether a CM should receive a promotion to LCM.

The RCC, not the LCM, reviews the evaluations with the evaluated employees. Additionally, the RCC always reviews the input of the LCMs on performance evaluations to ensure that the employees have been fairly treated. LCMs sometimes perform evaluations for new employees and sometimes perform annual evaluations. However, the extent to which they complete the evaluations varies. The RCC frequently performs both types of evaluations for employees and there does not appear to be any particular reason why some evaluations are commenced by LCMs and some are not. Indeed, the record discloses that CMs, like the LCMs, who work with new employees are sometimes asked to provide an opinion of the new employee's work.

Discipline

With regard to discipline, the Employer has "House Rules" or a disciplinary procedure that identifies employee conduct in three separate categories. Category A offenses are those offenses that may result in immediate termination. Category B offenses are those offenses in which the "management team" can decide to issue a final warning with a repeat infraction resulting in immediate termination. Category C offenses may lead to corrective action under the Employer's "Performance Counseling & Improvement Plan" and an employee's failure to improve his performance may result in termination.

The "Performance Notes," that LCMs occasionally complete, are distinguished from discipline under the "Performance Counseling & Improvement Plan" as being "For

Documentation Only.” The record discloses that CMs have been authorized to complete performance notes, but there is no evidence that they have done so. Additionally, RCC Robby Stephens, who was employed in a LCM capacity as recently as December 2005, informed employees that performance notes do not constitute disciplinary action but are merely a means to document the occurrence of any problems. In this regard, the record discloses that six performance notes in one CMs’ file, most of which she was unaware of, did not lead to any disciplinary action taken against the employee.

The pre-printed material at the top of the “Performance Notes” forms indicates that they are used to document all verbal warnings. However, this pre-printed material also specifies that performance notes are used to record team member coaching sessions, both positive and negative, and to serve as a reference for completing performance appraisals and evaluations. The distinction between coaching sessions and disciplinary verbal warnings is blurred. However, verbal warnings are only considered discipline if they are initiated by acknowledged statutory supervisors above the LCMs, or if they are independently reviewed by acknowledged statutory supervisors who determine whether a negative note warrants discipline if additional negative behavior is subsequently documented. Otherwise, performance notes merely serve to document an event. The record discloses that employees often are unaware that they have received a performance note. Performance notes are typically placed under the RCCs’ office door for his or her review. As indicated above, the RCC and other agreed or stipulated supervisors may also write performance notes.

Written and final warnings are issued by the RCC as part of the Employer’s “Performance Counseling & Improvement Plan”. Only the Associate Executive Director or the Executive Director at the Bexley facility may terminate an employee. With one exception, there is no evidence that an LCM has issued a written warning at Bexley unless specifically instructed to do so by an acknowledged supervisor. The exception occurred in 2003 when the RCC position was vacant and a senior LCM completed the warning and a subsequent termination recommendation. In that instance, the discipline was forwarded to a department head and the then executive director for review and approval. Moreover, the “no-call/no-show” on that occasion was clearly defined for disciplinary action under the Employer’s stated policy, and no independent judgment was required in connection with the reporting of the event.

Scheduling

Scheduling for the LCMs and the CMs is performed by the RCC, who composes the schedule about 2 weeks in advance. LCMs and CMs who call off work are supposed to provide at least 4 hours notice and they are instructed to call off to the RCC or to the AED. An LCM or CM who calls off work is responsible for finding his or her own replacement for the shift. LCMs who received a call off would direct that employee to report the call off to the RCC. Just prior to the hearing, the procedure was changed slightly by the RCC, and CMs who were calling off work were allowed to call off to an LCM. However, RCC Dillon testified that CMs are still required to contact her first, if she is in the facility. Even when an LCM receives a call off, the CM calling off is encouraged to continue attempting to contact the RCC or the AED. If the employee calling off cannot find a replacement, the LCM is responsible for finding a replacement or fills in herself if she is unable to find a replacement. The LCM may seek

assistance from the RCC in finding a replacement. As of the time of the hearing there is no evidence that an LCM has had to work in place of a CM who called off.

In regard to finding replacements, the Employer has a strict policy against employees working overtime. Accordingly, any LCM or CM who is filling in for another LCM or CM may not do so without prior approval from the RCC if overtime hours would result. The shift and assignment of the LCM or CM who calls off work may be filled with either an LCM or a CM who is available and if the shift would not result in overtime hours. Thus, there is no requirement that an unavailable LCM be replaced with another LCM. CMs are generally discouraged from accepting call offs. Although they occasionally do so and simply relay the message to the RCC. LCMs cannot mandate a CM or another LCM to cover a shift for an absent employee. LCMs have no authority to approve a CMs' sick time or vacation requests. CMs and the LCMs must submit these request to the RCC.

All employees attend regularly scheduled "town hall" style meetings at which matters of general concern or importance are discussed. In addition, the LCMs and the CMs attend monthly meetings conducted by the RCC. The LCMs also attend separate monthly meetings with the RCC that are not attended by the CMs. It appears that issues relating to the CMs may be discussed at the separate meetings with the LCMs but the record lacks specific testimony on this point.

"Cross over" meetings are held on "reminiscence" and in "assisted living" at the beginning and conclusion of each shift. These meetings consist of a brief conversation between oncoming LCMs or CMs and LCMs and CMs who are completing their shifts on each floor. "Cross over" meetings frequently involve LCMs where there is an LCM assigned to that particular neighborhood for that particular shift. However, where there is not an assigned LCM, the "cross over" will involve a CM who is responsible for that particular neighborhood and shift. The RCC speaks briefly each day with LCMs whose shifts overlap with her work hours for the purpose of keeping apprised of any developments in the facility.

Work Attire

There are no uniforms worn by employees at the Bexley facility. Attire for the LCMs and CMs is business casual. Employees wear colored name tags. The LCM name tags are gold in color while the CM name tags are green.

V. OTHER EMPLOYEES IN ISSUE

Wellness Nurses

The Employer currently employs five wellness nurses in the Bexley facility. Two of the nurses are registered nurses (RNs) and the remaining three are licensed practical nurses. (LPNs) A college degree is required for the position of wellness nurse. Two of the LPNs are full-time employees and the remaining three wellness nurses, including the two RNs, work a part-time schedule. The wellness nurses are paid between \$17.61 and \$19 an hour and are scheduled on

two primary shifts from 6 a.m. to 2 p.m. and from 2 p.m. to 10 p.m. A wellness nurse is always on call between 10 p.m. and 6 a.m. should an emergency situation develop.

The wellness nurses have an office on the second floor of the facility known as the Wellness Center. The center functions like a nurses' station and is the location where the nurses maintain their records and complete their paperwork. The primary functions of the wellness nurses are to pass medications to residents who need them, monitor the residents' physical, mental, and emotional condition, and, noting and recording any changes to their condition. Additionally, they are responsible for performing treatments prescribed by physicians. Only one wellness nurse works in the facility at any given time.

Medication passes consume most of the wellness nurse's shift time as each medication pass may take as much as 3 to 4 hours to complete. Under Ohio law, medication for assisted living residents may only be passed by licensed nurses. The residents' medication is kept locked in a medication cart when a pass is not taking place. The care managers sometimes assist wellness nurses by aiding in the physical requirements of applying treatments to residents or by encouraging residents to take their medication. The wellness nurses also assist residents with their immediate needs, such as assisting them in using the bathroom; walking when assistance is needed; and, helping them with personal hygiene.

Director of Community Relations

Sarah Chaney is the Employer's Director of Community Relations (DCR) and has held this position since the middle of April 2006. She reports to AED Kneisley and has an office located in the middle of the first floor of the facility. She is salaried and is paid approximately \$32,000 a year, plus bonuses and commissions; the precise amounts were not specified in the record. Chaney has a Bachelor of Science degree in business with a concentration in marketing. However, a college degree apparently is not required for the DCR position, but 2 years of sales experience is a requisite.

The DCR describes the most important aspect of her job as being to "close a sell." This means that she is responsible for recruiting residents for the Bexley facility by marketing the Employer's facilities to prospective residents and the professionals with whom she comes into contact. She accomplishes this task, in part, by networking with the surrounding professional community in an attempt to generate resident referrals. The DCR estimates that 20% to 25% of her work time is spent in providing prospective residents and their families with tours of the facility; 10% to 15% of her time is spent interacting with LCMs, CMs, housekeepers, and in contact with residents; 25% of her work time is spent away from the facility engaged in sales and marketing related tasks; and, the remainder of her time is spent answering and making telephone calls and inputting information into the Employer's computer database. Another way of viewing her time allocation, is reflected on her job description, which specifies 70% of her time is spent in sales execution, 20% is spent engaging in external business development, and 10% is spent in planning, administration, and advising management. Her sales role is not limited to the Bexley facility since she also attempts to generate sales of suites for potential residents for other Employer locations. She typically works Tuesday through Saturday from about 9 a.m. to 6 p.m., but her hours are flexible.

Administrative Assistant

The Employer's administrative assistant is Erin Kennedy. Kennedy is an hourly employee who is paid \$12.45 an hour. She reports to AED Kneisley and works Monday through Friday, typically from 9 a.m. to 5 p.m. each day, averaging between 32 hours and 40 hours a week.

Kennedy estimated that she spends about 70% of her work day performing her job duties that are primarily business clerical in nature and 30% of her work day socializing with residents. Kennedy's principle duties include time, attendance and payroll functions; recruiting, hiring and training functions; human resources/benefits accounting support; and, administrative and clerical functions. The duties she performs are described in the administrative assistant job description maintained by the Employer, which includes processing payroll, maintaining employees' personnel files, and assisting employees with benefits information. Kennedy has a Bachelor of Arts degree, but a college degree is not required for her position.

Kennedy shares a desk with the concierge on duty, but when the concierge is in the facility she will often perform her duties from another location. She often eats lunch with the AVC and interacts with residents, CMs and nurses throughout her work day. Perhaps twice a month, she assists one resident in particular, who has a suite across from her desk near the front of the facility, by aiding her in getting dressed.

Activities and Volunteer Coordinator

Kathleen O'Connor is the Employer's Activities and Volunteer Coordinator (AVC). Prior to becoming the AVC, O'Connor served as the Reminiscence Coordinator, a title that does not currently exist, and also as the RCC for a short time. O'Connor is an hourly employee earning \$14.90 an hour and typically works from 8 a.m. or 8:30 a.m. to until 5 p.m., Tuesday through Friday, and from 8 a.m. to 3 p.m. on Saturday. She shares office space with the CMs.

O'Connor's principle duty is to plan and oversee all activities for the residents at the Bexley facility. She participates in activities with residents for at least four and a half hours each day such as afternoon van rides for residents. Van rides include trips to a local restaurant or a park or merely taking the residents for a drive. However, about once a week a van ride will require the residents to leave the van. On these trips, a CM typically accompanies her. O'Connor also uses the van to take residents on errands and appointments, including doctor and dental appointments.

O'Connor also arranges special events for the residents and may retain outside entertainers, including a piano player; a gentleman who presents a slide show travelogue; and, zoo employees who bring small zoo animals for the residents benefit. For large events, such as a Mother's Day brunch, O'Connor will enlist the assistance of other employees at the facility, including CMs, who help her plan and participate in the function. She also plans a "happy hour" for the residents each Friday and a monthly "Family Night" event.

O'Connor keeps a monthly and daily calendar of scheduled events that she posts in conspicuous locations throughout the facility to keep the residents informed. She also places daily reminders of events for the staff in the Daily Log. O'Connor leads many of the activities that she plans, but LCMs and CMs also frequently lead and participate in activities for the residents.

O'Connor is responsible for coordinating the use of volunteers at the facility including arranging clergymen to conduct religious services and study. She also enlists other volunteers to aid with functions, such as having a local Girl Scout troop assist with the Mother's Day brunch. O'Connor has primary responsibility to care for the pets at the facility, but CMs assist her in cleaning litter boxes and in walking the Bexley facility dog. Some of the pets at Bexley belong to specific residents and others are common animals kept for the well-being of the residents.

Concierges

The Employer employs two (a full-time and part-time) concierges at the Bexley facility. Rita Adams is the full-time concierge and Marie Heckler, a new hire, is the part-time concierge. Adams typically works from 9 a.m. to 5 p.m. or 10 a.m. to 6 p.m. on weekdays, but she also works some weekend hours. Heckler works part-time in the evenings and on weekends. Adams and Heckler perform the same job duties and are paid \$9.50 an hour; both report to Associate Executive Director Kneisley. Adams works about 32 hours a week and it is expected that Heckler will work approximately 20 hours a week. Concierges take the same Star Level training in resident care as the other employees and Adams has completed the first three levels of this training.

The Concierges have a desk in an open area to the immediate left of the entry foyer. As previously noted, this desk is shared with Administrative Assistant Kennedy. Concierges interact with residents' family members and other visitors. In this regard, the concierges regularly receive comments from visitors regarding the care residents receive and will sometimes make notations of these comments in the daily log.

Concierges interact with residents in a variety of ways. They pass out mail to the residents and receive telephone calls for them. Concierges also distribute mail to Bexley employees who receive mail at the facility. Although they are primarily responsible for answering the telephone calls that come into the facility, when they are not at the desk or able to quickly get to the telephone, they are assisted in this task by other employees. They participate in the resident activities such as in sing-a-longs, bingo, special events and taking residents for walks. Adams sometimes assists in the dining room by pouring coffee and conversing with residents. She also assists in obtaining snacks or late meals during non-meal periods for residents. Adams has performed some minor clerical functions, including updating employee phone lists, creating a mailbox list, and updating emergency forms.

VI. THE LAW AND ITS APPLICATION

A. Labor Organization Status:

I must first briefly address the preliminary issue of whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Section 2(5) of the Act defines a labor organization as:

...any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Board has noted that, "Under this definition, an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the purpose of representing them. *Coinmach Laundry Corp.*, 337 NLRB 1286 (2002); citing *Butler Mfg. Co.*, 167 NLRB 308 (1967); *East Dayton Tool & Die Co.*, 194 NLRB 266 (1971). In this regard, the Board in *Coinmach Laundry* reviewed the extant case authority in this area and noted that "structural formalities are not prerequisites to labor organization status." Citing, *Yale New Haven Hospital*, 309 NLRB 363 (1992)(no constitution, bylaws, meetings, or filings with the Department of Labor); *Betances Health Unit*, 283 NLRB 369, 375 (1987)(no formal structure and no documents filed with the Department of Labor); *Butler Mfg.*, supra at 308 (no constitution, bylaws, dues, or initiation fees); *East Dayton Tool*, supra at 266 (no constitution or officers).

Here, the record clearly establishes that the Petitioner admits to membership employees of the Employer and that the Petitioner was formed for the purpose of representing employees. Thus, the Petitioner exists, at least in part, for the purpose of dealing with the Employer concerning conditions of work and other subjects such as grievances and labor disputes and to this end it intends to negotiate a contract with the Employer if it is selected as the employees' collective-bargaining representative. Accordingly, I conclude based on the foregoing and the record as a whole, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Coinmach Laundry Corp.*, supra, and cases cited therein.

B. The Section 2(11) Status of LCMs:

I turn now to an analysis of the remaining issues, the putative supervisory status of the LCMs. Before analyzing the specific duties and authority of the LCMs, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the LCMs possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490

(1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer asserts that the LCMs are statutory supervisors and, therefore, it has the burden of proof establishing their supervisory status. Specifically, the Employer asserts that the LCMs use independent judgment to issue verbal disciplinary warnings to CMs, prepare evaluations of CMs that are directly tied to CM wage increases, and to assign and responsibly direct the work of CMs. In addition, the Employer asserts that the LCMs' supervisory status is buttressed by the possession of certain secondary indicia of supervisory authority. Secondary indicia relied on by the Employer includes LCMs role in training CMs, attendance at meetings that CMs do not attend, and the absence of higher authority on-site for significant portions of each day. Contrary to the Employer, the Petitioner maintains that LCMs are not statutory supervisors, but rather are more akin to lead persons.

Discipline

I will first address the purported role of LCMs in disciplining CMs. The Board has held that in order to establish supervisory authority, based on their indicia, an employer must demonstrate that an individual's participation in the disciplinary process leads to a personnel action without an independent review or investigation by other management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). In this regard, the Board has repeatedly held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See, *Illinois Veterans Home At Anna L. P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, at 812 (1996). Moreover, where oral and written warnings, "simply bring to an employer's attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function, which is not supervisory authority." *Williamette Industries, Inc.*, supra (citations omitted).

Here, I conclude that the LCMs participation in completing "Performance Notes" is more akin to reportorial than the imposition of discipline. In this regard, the record establishes that these notes may be positive or negative; CMs may complete them; and, the recently departed RCC characterized them as constituting documentation only rather than a form of discipline. Moreover, the record shows that the RCC places performance notes in the personnel files of CMs and other employees and that she and other statutory supervisors determine whether such documentation merits subsequent consideration in the disciplinary process. In this connection, I note that the Employer's progressive disciplinary procedure is hardly mandatory, but is rather discretionary because the ultimate authority to determine what discipline an employee should receive, if any, rests far above the LCMs who merely report on CM conduct – good and ill.

The evidence of LCMs participation in the putative disciplinary process beyond completing "Performance Notes" shows that their involvement is limited, sporadic, remote in time, and occurs only in the context of a vacuum in authority when there was no RCC, or occurs at the behest of an uncontested supervisor who instructed the LCM to prepare the "Performance

Note” including what to write and how to write it. Finally, I note that while the current RCC may not have reversed or modified a “Performance Note” such evidence is hardly probative as she has only been in the position a few months. In sum, I conclude that the Employer has clearly *not* vested LCMs with true supervisory authority to discipline, but merely utilizes them to report on the conduct of employees with whom they work. Accordingly, I do not find the LCMs to be statutory supervisors based on their role in reporting employee conduct, including perceived infractions.

Evaluation

With regard to the purported authority of LCMs to reward employees through their evaluating CMs, I note that the Board has repeatedly admonished that Section 2(11) does not include the term “evaluate” in its enumeration of supervisory functions. Accordingly, when an evaluation does not by itself affect wages, promotional opportunities, or the job status of the employee being evaluated the individual who performs the evaluation will not be found to be a statutory supervisor. See, *Harborside Healthcare*, supra at 1335; *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999). In addition, the Board has held that when undisputed statutory supervisors have final authority with respect to evaluations and use their own independent judgment in evaluating employees, that the role of the subordinate employee in the evaluation process is merely advisory and preliminary. *Children’s Farm Home*, 324 NLRB 61 (1997); see also, *Quality Chemical Incorporated*, 324 NLRB 328 (foremen not supervisors where undisputed statutory supervisors reviewed evaluations, could make modifications, and participated in the review with the evaluated employee); contra, *Bayou Manor Health Center, Inc.*, 311 NLRB 955 (1993)(no review of numerical scores by any higher ranking individual). Moreover, to the extent that the putative supervisors make recommendations for wage increases in their evaluations where undisputed statutory supervisors conduct their own independent investigation to determine if merit increases are warranted, such evidence militates against a finding of effective recommendation of a reward. *Children’s Farm Home*, supra.

Here, I conclude that the LCMs participation in completing CMs’ “Performance Appraisals and Evaluations” is, as was the case in *Children’s Farm Home*, merely advisory and preliminary. Thus, the record discloses that LCMs sometimes participated in the evaluation process, sometimes did not, and sometimes only partially participated in the process. The former and current RCC sometimes gave LCMs blank evaluations to prepare, but circumscribed their ability to evaluate by suggesting that all numerical scores should be “3s” or “4s.” In some instances, the numerical rating was completed by the RCC prior to seeking the LCMs assistance with the remainder of the evaluation and in other instances portions of the evaluation were already completed. The record discloses that these performance evaluations were also clearly reviewed by undisputed statutory supervisors as there was testimony that the RCC reviews the evaluations for accuracy and would change the evaluation if there were disagreement with any of the ratings provided by an LCM. As RCC Dillon testified about the evaluations, “But then I review it after the leads do it. And I always make sure, just to make sure that everything’s fair.” Finally, I note that the LCM does not review the evaluation with the CM. Rather, it is the RCC who meets with the evaluated employee.

Based on the foregoing and the entire record, I do not find the LCMs to be statutory supervisors as a result of their role in evaluating CMs. In this regard, while not dispositive of my findings, I note that the evidence is inconclusive regarding whether these evaluations contain information from LCMs that could be construed as a recommendation for a specific merit increase. Indeed, many of the LCMs had no idea that the ratings correlated to a particular wage increase and the Employer's assertion that they do are not documented in any of the voluminous exhibits placed in evidence by the Employer.

Direction and Assignment

With regard to the Employer's contention that the LCMs responsibly direct work and make assignments to CMs, I find that the evidence in support of this contention is sparse. In this regard, the record discloses that there are various tasks that the LCMs and CMs must perform on each shift. These tasks primarily revolve around the residents' ADLs and, therefore, much time is spent in seeing that basic needs such as eating, toileting, continence monitoring, dressing, and entertainment are met. Although an LCM may temporarily move a CM to a floor or group of rooms that is uncovered by a call off, this involves no real exercise of discretion as minimal coverage is required for the "reminiscence neighborhood." See, *Northern Montana Healthcare Center*, 324 NLRB 752, 754 (1997). Additionally, the record discloses that either an LCM or a CM may request assistance of each other, particularly in performing physical tasks such as turning a resident. In considering the responsible direction criterion, I note that LCMs often work on a separate resident floor from the CMs and that much of their work shift necessarily occurs without significant opportunity for oversight of the work performed by the CMs. Indeed, there is no evidence that the LCMs regularly oversee the work of the CMs, except that they are responsible to see that the routine tasks that are performed on a day to day basis are completed. In this regard, the Board has found supervisory status to be lacking when a disputed employee merely ensures that other employees perform their jobs properly and call to the attention of those employees that a task has not been correctly performed. *Beverly Health and Rehabilitation Services*, 335 NLRB 635; *Franklin Home Health*, 337 NLRB 826.

With regard to assignment, the record discloses that LCMs sometimes provide CMs with assignment sheets and they sometimes input information on these assignment sheets. However, these sheets primarily contain pre-printed information that is provided by the RCC and this information remains constant because the LCMs and the CMs are designated to care for certain residents on a permanent basis. When assignment information is provided by the LCMs, it is primarily taken from lists that are maintained by other personnel in the facility. This includes bath/shower information, a laundry schedule and activities that have been calendared by the activities and volunteer coordinator. LCMs may deviate from the laundry schedule because it is not always up to date and they may divide the laundry assignments between themselves and other CMs. However, the record discloses that LCMs merely equalize the laundry distribution to ensure that the work is divided fairly and they do not make an independent judgment as to which CM is more capable of washing laundry. Assignments that merely equalize work do not require the degree of discretion needed to confer supervisory status. See, e.g., *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997).

Recreational activity assignments are primarily dictated by the lunch schedules for LCMs and CMs. These lunch break times remain constant and are tightly constrained by the need to have the breaks at times that will not interfere with the residents' meal schedule or other needs. There is flexibility in determining which LCM or CM should do a particular activity with the residents. In this connection, the record discloses that the LCMs and CMs may switch their activity assignment by agreement. CMs on occasion will change a planned activity. An example is that a walk may be changed to an indoor activity if the weather is not conducive to an outside activity.

Based on the foregoing, and the record as a whole, I do not find the LCMs to be statutory supervisors because of their alleged role in directing and assigning the CMs. In reaching my conclusion on this point, I note that the Supreme Court has stated that, "Many nominally supervisory functions may be performed without the 'exercise [of] such a degree of...judgment or discretion...as would warrant a finding' of supervisory status under the Act." *Kentucky River*, 532 U.S. at 713. The routine nature of the tasks performed by the CMs here certainly warrants the conclusion that independent judgment or discretion with regard to responsible direction and assignment is sorely lacking.

Secondary Indicia

Finally, I note that secondary indicia is insufficient to confer supervisory status where the evidence fails to establish that the individual in dispute possess one or more of the Section 2(11), or primary, indicia. *Crittendon Hospital*, 328 NLRB 879 (1999). I have found that the LCMs do not possess any of the Section 2(11) indicia. Consequently, the secondary indicia proffered by the Employer do not satisfy its evidentiary burden of proof. The fact that the LCMs sign as "supervisors" on performance notes and evaluations is the type of "paper authority" which the Board has consistently found does not confer supervisory status in the absence of evidence that the employee actually performs the supervisory functions. *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978). Similarly, the acceptance of "call offs" does not support a finding of supervisory status. Additionally, the fact that an LCM is the highest ranking employee in the facility for significant time periods is unpersuasive when there is inferential evidence that the RCC or another undisputed statutory supervisor is always available to an LCM working the latter part of the evening shift or overnight in the event of an emergency situation. Moreover, most of the residents of the facility require a significantly lower standard of care than that found in a more traditional nursing home environment and during overnight hours very little activity occurs. The other secondary indicia referenced by the Employer are similarly not indicative of supervisory status when there are no primary indicia established. In regard to the secondary indicia referenced by the Employer, I also note that many of these indicia may accurately be construed as reflecting lead person status, rather than that of a statutory supervisor.

Conclusion

Based on the foregoing, the record as a whole and having carefully considered the arguments of the parties at the hearing and in the Employer's brief, I find that the Employer has failed to meet its burden of proving that the LCMs are statutory supervisors. Rather, the LCMs are, at best, merely "straw bosses" who do not exercise any independent judgment with respect

to Section 2(11) indicia. See, e.g., *Somerset Welding & Steel Co., Inc.*, 291 NLRB 913, 914 (1988); *Dura-Vent Corporation*, 257 NLRB 430, 431-432 (1981). Although not a primary indicia of supervisory status, I note that if I were to find the lead employees to be supervisors, there would be a ratio of one supervisor for approximately every three unit employees, a rather high ratio and a factor which militates against the LCMs being supervisors. Finally, the record shows that the LCMs have frequent contact with other employees in the proposed unit, with minor exceptions perform the same tasks as the CMs and are paid only an extra dollar an hour to perform LCM duties. Otherwise, the LCMs receive wages similar to the CMs and share the same benefits and working conditions with CMs. Accordingly, I conclude that the LCMs are not supervisors and I have included them in the unit.

C. Community of Interest Issues:

I turn now to a consideration of the community of interest issues raised by the Employer's position, to include, contrary to the Petitioner, employees in the prospective unit. Section 9(a) of the Act only requires that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining, and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Company*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by the petitioning labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Overnite Transportation Company*, 322 NLRB 723 (1996); *Purity Food Stores*, 160 NLRB 651 (1966). The appropriateness of a given unit is governed by community of interest principles.^{6/} In

^{6/} The Employer would have me apply the "empirical community of interest test" used by the Board for determining the appropriateness of bargaining units in nonacute care health care institutions. *Park Manor Care Center*, 305 NLRB 872 (1991). Under that test, the Board considers community-of-interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on *Collective-Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking*, 284 NLRB 1528 (1984) and *Final Rule*, 284 NLRB 1580 (1984). The Board further considers the evidence presented during rulemaking with respect to units in acute care hospitals and prior cases involving either the type of unit sought or the type of health care facility in dispute. I decline to apply *Park Manor* and its progeny to my analysis of the instant matter as I find that the Employer's Bexley facility is not a non-acute health care institution as such institutions are commonly defined. As the Employer states at page 5 of its post hearing brief:

Sunrise of Bexley is not a nursing home. Occasionally, residents must move out of the Bexley community to a nursing home or some other skilled care facility, but Sunrise tries to make that a last resort through its principle of "Aging in Place." Sunrise will work with residents and their families to let them remain in Bexley's socialized setting for as long as possible, up until the resident's death or until the resident's conditions are so acute that Ohio regulations dictate that the person must leave. (Footnotes omitted.)

In this regard, I find that the health care functions provided by the Employer at Bexley are ancillary to its primary purpose and that is to provide a quality of life environment to seniors who may need assistance with at least some of their ADLs. Thus, the concerns that may be valid in a nursing home environment, including the potential proliferation of units, are not valid concerns in an environment where many of the residents are largely self-sufficient and others require only periodic monitoring, but not around the clock medical attention. However, even if I were to apply the *Park Manor* empirical community of interest test to the Bexley facility, my conclusions regarding the appropriate composition of the unit would be the same. See, e.g., *CGE Caresystems, Inc.*, 328 NLRB 748 (1999)(business office clericals properly excluded); *Hillhaven Convalescent Center of Delray Beach*, 318 NLRB 1017 (1995)(LPNs as technical employees properly excluded from overall nonprofessional unit).

analyzing community of interest among employee groups, the Board considers bargaining history; functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision, and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB at 89; *J.C. Penney Co.*, 328 NLRB 766 (1999). In addition, the Board considers whether the employees, if excluded, would constitute a separate appropriate unit or would be more appropriately included with the other employees not in the unit. *Overnite Transportation Co.*, supra.

Applying the above factors to facts in the subject case, I find that the concierges and the activities and volunteer coordinator share a substantial community of interest with the other unit employees to require their inclusion in the unit. However, I find that the remaining employees sought to be included by the Employer do not share a sufficient community of interest with the unit employees to mandate their inclusion in the unit. In this regard, I conclude that the administrative assistant is primarily an office clerical employee who does not share a strong community of interest with the unit employees. The director of community relations is primarily a sales and marketing employee who spends much of her time away from the facility, and the wellness nurses are professional and technical employees who may properly constitute a separate appropriate unit.

Concierges and Activities and Volunteer Coordinator

I will address first my decision to include the concierges and the activities and volunteer coordinator in the unit. As previously noted, the concierges frequently interact with residents and their families by receiving input from them regarding residents' living arrangements and by providing residents with services such as taking and forwarding their telephone calls, delivering their mail, pouring coffee, obtaining food items, and participating in recreational activities. Additionally, they sometimes engage in other forms of social interaction with the residents. In performing these functions they often work with and in close proximity to LCMs, CMs, and occasionally with others in the prospective unit including housekeeping staff and cooks.

The concierges' wages, benefits, and other conditions of employment are similar to that of other employees in the proposed unit. The concierges report directly to AED Kneisley who is the ultimate superior at Bexley of all of the employees in the proposed unit even though they are immediately supervised by different department heads. The minor clerical functions performed by the concierges, such as preparing various lists and updating emergency forms, do not warrant classifying them as office clerical employees.

Based on the foregoing, and the entire record, I conclude that the concierges share a substantial community of interests with the other unit employees to mandate their inclusion in the unit. Accordingly, I will include them in the unit.

Activities and Volunteer Coordinator (AVC) Kathleen O'Connor plans and oversees all activities for the residents at the Bexley facility. The Employer characterizes the AVC as "essentially ... a Care Manager, responsible for the resident's mental well-being instead of the physical well-being." I find that this is an accurate characterization which is supported by the

record. In this regard, she spends most of her work day engaged in recreational activities with the residents. She also transports residents to their appointments and occasionally assists them with some ADL functions such as getting dressed. When she is not actually engaged in these activities, she is planning other activities for the residents. She shares an office space with the CMs and her rate of pay, hours of work, and benefits are all similar to that received by LCMs and CMs. However, there are some minor differences. For example, she typically works from 8 a.m. or 8:30 a.m. to 5 p.m. during the week with some Saturday hours and her pay is near the high end of the range received by LCMs.

The AVC has substantial interaction with CMs and LCMs in the course of performing her job duties. Thus, the activities that she schedules are frequently led by CMs and LCMs. CMs, LCMs, concierges, and other employees in the facility frequently participate in activities with residents and assist the AVC in setting up and putting on special events for the residents. Moreover, a CM accompanies the AVC at least once a weekly in taking residents on van outings to various locations, including restaurants.

Based on the foregoing and the entire record, I conclude that the AVC shares a sufficient community of interests with the other employees in the proposed unit to require her inclusion in the unit. Accordingly, I will include her in the unit.

Administrative Assistant

Erin Kennedy is the Employer's administrative assistant; she spends about 70% of her workday engaged in typical business office clerical functions. Her principle duties include such traditional office clerical duties as time, attendance, processing payroll, assisting employees with benefits information, and maintaining employees' personnel files. See, e.g., *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993). She also has recruiting, hiring, and training functions; human resources/benefits functions; accounting support that includes receiving and forwarding invoices to corporate accounts payable; and, administrative and clerical functions that include ordering and maintaining office supplies and copying and filing for the executive director. Contrary to the Employer's assertion in its brief, the record does not disclose the precise parameters of Kennedy's participation in any Medicare, Medicaid, or other reimbursement system. However, even assuming that she is not involved in processing reimbursements claims under these programs, her other duties are clearly office clerical in nature. Kennedy shares a desk with the concierge but she often works elsewhere in the facility when a concierge is present.

Kennedy has some social interaction with the residents and she occasional interaction with other employees in the facility, but her contact with other employees often pertains to processing payroll or in explaining to employees the Employer's health benefits. In addition, the small size of the facility and her recent dual role as administrative assistant and concierge until March 2006 leads her to have some contact with the residents and employees in the proposed unit. Although she has a college degree, such a degree is apparently not required for her position.

Based on the foregoing, and the record as a whole, I conclude that the administrative assistant, Erin Kennedy, does not share a substantial community of interests with the other employees in the proposed unit. Accordingly, I will exclude her from the unit.

Director of Community Relations

Director of Community Relations (DCR) Sarah Chaney reports directly to Kneisley and has an office in the middle of the first floor of the facility. She is salaried and receives \$32,000 a year plus unspecified bonuses and commissions in connection with her sales work. She has a Bachelor of Science degree in business with a concentration in marketing. However, a college degree is apparently not required for the position but the position does require 2 years of sales experience.

As previously discussed, the DCR spends as much as 25% of her work time giving tours of the facility to prospective residents and their families. Her job is to "close a sell." In this pursuit, she spends about 25% of her working hours away from the facility engaged in sales and marketing related tasks in an attempt to acquire residents for the Bexley facility or for other of the Employer's facilities. The vast part of each work day for the DCR (70%) is spent, in some fashion, generating sales. A small percentage of each work day is spent interacting with residents and other employees in the home. This interaction is typically ancillary in connection with a tour or a resident moving into the home.

I conclude that the DCR shares very little community of interests with the employees in the proposed unit. She is essentially a sales and marketing person whose job is to sell the Employer's facility to referral sources and to prospective residents and their families. Although she has some interaction with residents and employees in the course of performing these duties, the interaction is ancillary to her primary purpose of selling and marketing, which requires her to interact primarily with individuals outside the community. In reaching this conclusion, I am also mindful of her significantly higher compensation, her salaried status, and her higher degree of education, even though it may not be a requirement for the position.

Based on the foregoing, and the entire record, I find that the DCR, Sarah Chaney, does not share a sufficient community of interest with the other unit employees to mandate her inclusion in the unit. Accordingly, I will exclude her from the unit.

Wellness Nurses

As previously noted, three of the wellness nurses are LPNs and two are RNs. All have college degrees that are required in connection with their licensing. The nurses earn between \$17.61 and \$19 an hour, a significantly higher wage rate than the highest paid employee in the proposed unit. Additionally, the nurses have their own office that they work out of and spend large portions of their shifts engaged in making medication passes or performing treatments on residents. Although they have significant interaction with the residents, their interaction with other employees in the facility is more limited. Their greatest interaction with other employees is with CMs and LCMs who may assist them with the physical requirements of a treatment or who may encourage a reluctant resident to take his or her medication.

It is clear that the LPNs are technical employees as defined by the Board and that the RNs are professional employees. The Board has defined a technical employee as an employee who does not meet the strict requirements of the term "professional employee" under the Act, but whose work is of a technical nature involving the exercise of independent judgment and requiring specialized training usually acquired in colleges or technical schools through specialized courses. See, *Brattleboro Retreat*, 310 NLRB 615 (1993), citing *Southern Maryland Hospital Center*, 274 NLRB 1470, 1471 (1985). Technical and professional employees who would otherwise constitute a separate appropriate unit are not typically included in a non-professional unit. There does not appear to be any compelling reason here to include the wellness nurses in the proposed unit.

Based on the foregoing, and the record as a whole, particularly noting that they may constitute a separate appropriate unit, I find that the wellness nurses do not share a sufficient community of interests with the employees in the proposed unit that would compel their inclusion in the unit. Accordingly, I will exclude them from the unit.

VII. THE EMPLOYER'S BRIEF

The Employer in its brief cites numerous cases in support of its position that the LCMs are statutory supervisors, and for the inclusion of all non-supervisory employees in the unit. Although I have not discussed in detail in this decision all of the cases cited by the Employer, I have, as previously noted, carefully reviewed and considered the brief and all of the arguments made by the Employer, including its reliance on: *Wilshire of Lakewood*, 345 NLRB No. 80 (2005), *Mountaineer Park, Inc.*, 343 NLRB No. 135 (2004), *Progressive Transportation Services*, 343 NLRB No. 126 (2003), *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001), *Beverly Enterprises – Massachusetts, Inc.*, 329 NLRB 233 (1999), *Lincoln Park Nursing and Convalescent Home, Inc.*, 318 NLRB 1160 (1995), *Charter Hosp of Orlando South* 313 NLRB 951 (1994) *Rhode Island Hosp.*, 313 NLRB 343 (1993), *Health Care and Retirement Corp.*, *Valley View Nursing Home*, 310 NLRB 1377 (2000), *Brattleboro Retreat*, 310 NLRB 615 (1993), and *Park Manor Care Center, Inc.*, 305 NLRB 872 (1991). For the reasons that I have fully detailed and explicated the relevant parts of this decision, the cases relied on by the Employer are, in my view, materially distinguishable from the instant matter and do not warrant a different conclusion.

VIII. SUPERVISORY EXCLUSIONS FROM THE UNIT

The record shows and I find that the following persons are supervisors with the authority within the meaning of Section 2(11) of the Act: Associate Executive Director, Shannon Kneisley; Resident Care Coordinator, Tammie Dillon; Dining Services Coordinator, Isaac Nehring, and the currently vacant positions of Healthcare Coordinator and Maintenance Coordinator. Accordingly, I will exclude them from the unit found appropriate.

IX. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above discussions, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time care managers and lead care managers, including the student care managers, housekeepers, cooks, concierges, and the activities and volunteer coordinator, excluding the resident care coordinator, dining services coordinator, maintenance coordinator, healthcare coordinator, director of community relations, associate executive director, wellness nurses, administrative assistant, and all professional employees, guards, and supervisors, as defined in the Act.

X. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Association of Healthcare Managers, Local 2600. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who

have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 7, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.


C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

XI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 14, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 30th day of June 2006.


Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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